Land, Rights, Laws: Issues of Native Title

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title parties

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Abstract

It has been suggested that the interpretation of the requirements of proof applied in Yorta Yorta v Victoria *may lead to discriminatory differentiation between one group of Indigenous people and another based on what are considered appropriately 'traditional' Aboriginal and Torres Strait Islander societies. This is particularly pertinent for Indigenous peoples of the more settled regions of Australia. Lisa Strelein discusses how the High Court, by relying on the act of state doctrine, has attempted to disavow any continuing authority within Indigenous societies capable of recognition by the courts once native title has come into existence. Strelein examines how the majority and dissenting judgments in* Yorta Yorta *have interpreted the role of the* Native Title Act 1993 *(Cth), and the developing body of common law native title. Strelein concludes that the High Court's decision in* Yorta Yorta *confirms that the legal outcomes of native title continue to become more and more elusive.*

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MEMBERS OF THE YORTA YORTA ABORIGINAL COMMUNITY V VICTORIA [2002] HCA 58 (12 DECEMBER 2002) – COMMENT[1]

Dr Lisa Strelein

The decision of the High Court in the *Yorta Yorta* appeal confirms that the gap between the aspirations of Indigenous peoples and the capacity of native title to fulfil those expectations is enormous.[2] The interpretation of the requirements of proof, and in particular the meaning attributed to the concept of 'traditional', form a significant part of that gulf.

This is particularly pertinent for Indigenous peoples of the more settled regions of Australia. The determination against the Yorta Yorta raises significant questions about what is considered 'tradition' in the sense that can sustain native title. It has been suggested that the interpretation of the requirements of proof applied in *Yorta Yorta* may lead to discriminatory differentiation between

one group of Indigenous people and another based on what are considered appropriately 'traditional' Aboriginal and Torres Strait Islander societies.[3]

The Yorta Yorta determination

At trial, the way that Olney J posed the question of proof in *Yorta Yorta* assumed an historical account of the laws and customs of the original inhabitants was required.[4] The traditions and customs observed at the time of settlement were said to constitute the title that burdened the Crown and it seemed that only through continued observance of these particular customs would the title survive. The forced settlement on missions within their traditional territories, and the suppression of language and old forms of cultural expression, and, importantly, the taking up of paid employment and admitted 'settling down to more orderly habits of industry',[5] were said by Olney J to be evidence that by 1881, a mere forty years after settlement of the area, the Yorta Yorta had lost their culture and their status as a 'traditional society'. This was in large part measured against their adoption of commercial farming and settled lifestyle. This approach has been replicated in other native title cases. The recent decision at first instance in *De Rose v South Australia* again saw the trial judge drawing a distinction between a recognised economic connection to land through work and industry and a perceived lack of 'aboriginal factors' influencing connection such as spiritual and cultural practice.[6]

The Yorta Yorta did not shy away from asserting that they maintained a continuing system of custom and tradition incorporating a traditional relationship to the land through which they asserted the relevant connection supported by continuous physical occupation.[7]

However, contemporary practices that the Yorta Yorta saw as cultural traditions, such as the protection of sites of cultural significance and involvement in the management of land and waters in their traditional areas, were rejected by Olney J because they were not of a kind that were exercised by, or of significance to, the pre-contact society.[8] He concluded that:

> Preservation of Aboriginal heritage and conservation of the natural environment are worthy objectives … but in the context of a native title claim the absence of a continuous link back to the laws and customs of the original inhabitants deprives those activities of the character of traditional …[9]

To this end, it was deemed appropriate to prefer the writings of a 19th Century squatter, Edward Curr, over the evidence of the Yorta Yorta witnesses. The traditions and customs observed by Curr were said to constitute the title that burdened the Crown and it seems that only through continued observance of these particular customs would the title survive:

> It is said by a number of witnesses that consistent with traditional laws and customs it is their practice to take from the land and waters only such food as is necessary for immediate consumption. This practice, commendable as it is, is not one which according to Curr's observations, was adopted by the Aboriginal people with whom he came into contact and cannot be regarded as the continuation of a traditional custom.[10]

The Full Federal Court appeal

The majority on appeal to the Full Federal Court in *Yorta Yorta*, while not rejecting the ultimate finding of Olney J, did reject a strict approach to the tracing of tradition from pre-contact. Branson and Katz JJ stated their interpretation:

> The primary issue is whether the law or custom has in substance been handed down from generation to generation; that is, whether it can be shown to have its roots in the tradition of the relevant community.[11]

Therefore, despite ongoing physical presence and assertion of rights to the land and maintenance of identification as a community entitled to the land and maintenance of cultural identity, the trial judge determined that the Yorta Yorta did not continuously occupy the land 'in the relevant sense'. The majority of the Full Federal Court supported the finding that there was a period of time between 1788 and the time of the claim during which the Yorta Yorta lost their character as a 'traditional Aboriginal community' and as a result native title had 'expired'.

The High Court

In the High Court, the claimants seized on comments from members of the Court in argument in *Yarmirr* regarding the centrality of the s.223 definition of native title in the *Native Title Act 1993* (Cth) (the NTA), and the obvious construction of the provisions in the present tense. The Court, in particular Justice Gaudron, queried whether an inquiry into the pre-contact activities of the community was necessary or appropriate. Her Honour criticised the Solicitor General (WA)'s emphasis on laws and customs 'still' recognised, noting that the s.223 definition made no reference to pre-contact laws and customs and was, in contrast, a contemporary reference to the laws and customs currently observed. Justice Gaudron queried, 'I do not see where the notion comes from that you have to look back and see that they were always recognised.'[12]

Chief Justice Gleeson and Gummow J similarly expressed concern at the arguments put by counsel on this matter:

> GLEESON CJ: Well, does it produce the consequence that if a group of people or a claimant, a group of claimants have abandoned their acknowledgment of traditional laws or their observance of traditional customs they lose their claim?
>
> MR MEADOWS: Yes, your Honour. So they have to show current acknowledgment or observance?
>
> GUMMOW J: Yes, but the nature of the observance, you seem to be saying, has to be the same at the time of the determination of the claim as it was here in 1824. That does not seem …
>
> MR MEADOWS: Well, that is just to give content to the word "traditional".
>
> GUMMOW J: I am not sure that is all that consistent with Yanner v Eaton.[13]

In the resulting decision in the *Yorta Yorta* High Court appeal, the majority of the High Court, led by Gleeson CJ, Gummow and Hayne JJ, suggested that the construction of the statute, and s.223 in particular, and the logic of jurisprudence requires a different conception of tradition than would be suggested on the ordinary meaning of the word. They agreed that 'tradition' meant the transmission of law or custom from generation to generation, usually by word of mouth and common practice. However, they argued that in the context of the NTA more was required.[14]

The dissenting judgment of Gaudron and Kirby JJ adopted the ordinary definition of tradition and agreed that the word traditional in s.223 imports a sense of continuity from the past.[15] Continuity, they argued, bears upon the question whether present day belief and practices can be said to constitute acknowledgment of traditional laws and observance of traditional custom.[16]

The majority joint judgement discussed the intersection between Indigenous and non-Indigenous systems of law that is recognised by the concept of native title. They said, 'It is critically important to identify what exactly it is that intersects with the common law'.[17] The Court determined that what native title recognises is the intersection of two bodies of law – that of the prior sovereignty

and that of the new sovereign. Consistent with the act of state doctrine,[18] the extent of intersection is determined by the law of the new sovereign. The rights and interests conferred by Indigenous society have their source and authority in a pre-existing and persisting sovereignty, but the extent of their enforceability under the new regime depends on the degree of 'intersection' determined by the common law or legislation.

The jurisprudential analysis is, at best, circular. The Court surmises that native title rights must find their source in traditional law and custom, but because the introduction of a new legal order denied the efficacy of any other normative system, or parallel law making system, the rights and interests claimed must have been brought into existence under that normative system when it was able to validly created new rights, interests and duties. Rights and interests created after the assertion of sovereignty that were not recognised by the common law and were not sourced in the new legal order could not be given legal effect.[19]

The Court has attempted to disavow any continuing authority within Indigenous societies capable of recognition by the courts once native title has come into existence. The Court relies on the act of state doctrine, which suggests that the acquisition of sovereignty cannot be challenged by a municipal court, to suggest that no parallel system of authority can emerge or allocate rights and interests after the assertion of British sovereignty.[20] But reliance on the doctrine in this way abdicates judicial responsibility and the power of the courts to determine the implication of the acquisition of sovereignty and to determine the distribution of power within the state. The abdication of judicial responsibility is exacerbated by the Court's adherence to a line of argument which suggests that it is the legislation which limits the ability of native title to recognise Indigenous peoples' rights to their lands, rejecting any continuing role for the common law in determining the underlying concept or framing the interpretation of the NTA. Justice McHugh in dissent questioned this reasoning, stating that he was 'unconvinced that the construction that this Court has placed on s.223 accords with what parliament intended.'[21]

Armed with this analysis, the Court then turned to the NTA. The idea that the source of native title is in the pre-existing normative system adds two additional criteria to the meaning of tradition beyond what would normally be understood. First, they suggest, the NTA conveys an understanding of the age of the traditions. That is, the source of the rights and interests is found in the normative rules that existed prior to the assertion of sovereignty by the Crown.[22]

Second, the Court suggests that the present tense of the statutory provisions requires that the normative system has had a continuous existence and vitality since sovereignty.[23] The continued existence of this normative system, it was argued, depends upon its maintenance and observance by the group who have bound themselves to it. In this sense, the Court suggests, maintenance of the normative system defines the society.[24] The Court was again careful not to establish a continuous tracing of activities or rights and interests to pre-contact times. It is the 'body of law' that must have continued. The content of that body of laws may undergo evolution and development but it must not suffer substantial interruption. The question of the relationship between the laws and customs now acknowledged and observed, and those that were observed before the assertion of European sovereignty, is therefore phrased, somewhat inelegantly, as necessary to a consideration, 'whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.'[25]

The dissenting judgement specifically addressed the idea of continuity of community. They agreed that a society must be sufficiently organised to create and sustain rights, beliefs and practices having normative influence, as well, it must be sufficiently organised to adapt, modify or extend the laws.[26] Lack of continuity of community will therefore open the way to conclude that current practices are not part of the traditional laws or customs. However, Gaudron and Kirby JJ warn that communities may disperse and regroup. The evidence that a community has the requisite continuity is primarily a question of whether there are persons who have identified themselves and each other as members of

the community in question.[27] While it is difficult to clearly articulate the different emphasis between Kirby and Gaudron JJ and the majority, simplistically it could be suggested that society determined the body of laws; the body of law did not define the society.

In determining that the Yorta Yorta no longer observe the same normative system that 'burdened' the Crown's acquisition of sovereignty, the majority joint judgement expressed their self-declared 'radical' proposition that the Yorta Yorta who came to the Court to assert native title were in fact a different society or group than that which had held native title.[28] The majority joint judgement acknowledged that the common law, in recognising native title, also recognised the rules of transmission for those interests and allows for the development of the right in a manner contemplated by that pre-existing traditional law and custom.[29] However, they deferred to the judgment of the trial judge in determining, on the facts, that there had been a significant disruption in the normative system of law and custom that sustained native title.

The dissenting judgement of Gaudron and Kirby JJ has a lot in common with the majority joint judgment of Gleeson CJ, Gummow and Hayne JJ, however they differ in their assessment of Justice Olney's conclusions. Justices Gaudron and Kirby suggested that Olney J had not found that the Yorta Yorta had ceased to exist as an identifiable community.[30] More fundamentally, they found that Olney J had not directed his inquiry to the acknowledgment of a system of laws and customs by which the group could establish a connection and instead examined whether there existed laws and customs specifically related to use and occupation.[31] This preoccupation with the exercise of rights and interests and laws relating to particular uses and activities has been rejected by the Court in *Ward*.[32]

Prior to this decision, the common law had accepted that the manner in which native title rights and interests are exercised will develop and change over time. In the *Mabo* case and since, the High Court has firmly stated that it does not expect that the laws and customs that sustain native title will be frozen in time or reflect some arcane notion of 'traditional' as reflecting pre-contact activities. It was accepted that native title rights and interests are regulated by law and custom internal to the group and that they change and evolve as the society changes and evolves.[33]

In *Yanner*, it was held that there is no prescription on the methods employed in the exercise of native title. It is generally accepted, for example, that modern methods will be employed in hunting and fishing. As Gummow J noted in *Yanner* and Lee J observed in *Ward* at first instance, it does not matter that fishing is undertaken from an outboard motored dinghy.[34] Justices Branson and Katz in the Full Federal Court appeal in *Yorta Yorta* explained also that the ability of traditions and customs to evolve is not limited to the mode of exercise but also the subject matter:[35]

> The primary issue is whether the law or custom has in substance been handed down from generation to generation; that is, whether it can be shown to have its roots in the tradition of the relevant community. However, for the reasons so persuasively articulated by Toohey J in *Mabo [No 2]* at 192…, it cannot be accepted that the fact that an indigenous society has adopted certain aspects of the now dominant culture means that the society has necessarily abandoned its traditional connection with land or waters.[36]

All that was required, it seemed, was that the general nature of the connection between the Indigenous people and the land remains.[37] Justice Brennan explained that:

> so long as the people remain an identifiable community, the numbers of whom are identified by one another as members of that community, living under its laws and customs, the communal native title survives to be enjoyed…[38]

This should have suggested a strong critique of the idea of abandonment of culture that had been read into Justice Brennan's judgment in *Mabo* by Justice Olney.[39] The High Court in *Yorta Yorta*

confirmed that some change to or adaptation of the system of law and custom or interruption in the enjoyment of native title rights and interests will not 'necessarily' be fatal to the claim, but in a particular case they may take on considerable significance. However, still focusing on the requirements of the NTA, they held that, while expressed in its present tense, s.223 still requires some continuity. This does not necessarily mean an unbroken chain of continuity, but the system of law and custom must have continued 'substantially uninterrupted' since the assertion of European sovereignty.[40] The key question in this instance is whether the law and custom can still be seen to be traditional law and traditional custom.[41] To answer this question, the majority joint judgement deferred to the judgement of the trial judge in assessing the evidence.

The High Court's reasoning in *Ward* had suggested that abandonment is not a form of common law extinguishment outside of the NTA.[42] The Court confirmed this in *Yorta Yorta.* The majority suggested that the term abandonment may be misleading in suggesting some blame for the interruption lies with the Indigenous community.[43] However, even before the High Court's decision in *Yorta Yorta*, Justice O'Loughlin in *De Rose* demonstrated that this same concept can be used to deny that claimants have maintained a connection under s.223(1)(b).[44] In a similar vein, the High Court in *Yorta Yorta* supported the decision of the trial judge, not on any assessment of the change and evolution of particular laws and customs or rights and interests, but the fundamental findings in relation to the interruption to the body of law and customs, the normative system, that defined the society.[45]

The objectification of the inquiry into whether an interruption has occurred, without laying blame, belies the fact that the Crown receives the benefit of overt disruptions to Indigenous peoples' enjoyment of the rights and interests. That benefit is reinforced by standards of proof that require claimants to establish the continuity of the system of law and custom back through to the assertion of European sovereignty. The Court stated quite frankly that the 'difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision'.[46] The Court accepted that claimants may invite the Court to infer from the evidence the content of the traditional laws and customs of earlier times in order to establish that they are rooted in a pre-sovereignty normative system.[47] However, the Court noted that the more restricted evidentiary rules introduced by the 1998 amendments to the NTA may make such inferences much harder than under the previous provisions.

The High Court's decision in *Yorta Yorta* confirms that the legal outcomes of native title continue to become more and more elusive. The establishment of a coherent and continuous society defined by a pre-sovereignty normative system creates an enormous grey area in the requirements of proof. The nature of the group has emerged as a fundamental threshold question for native title claimants. The High Court's deference to the views of the trial judge in *Yorta Yorta* demonstrates the vagaries of an assessment based, to a significant degree, on the judge's perceptions of the group. The High Court has done little to guide the trial judge away from their pre-existing biases and prejudices in making such an assessment. Native title claimants must rely on the ability of a non-Indigenous judiciary to conceive the contemporary expressions of Indigenous identity, culture and law as consistent with the idea of a pre-sovereign normative system.

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[1] This comment contains extracts from the article 'A Comfortable Existence: Commercial fishing and the concept of tradition in native title', forthcoming in *Balayi: Law, Culture and Colonialism.*

[2] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) (the *Yorta Yorta* High Court appeal).

[3] Noel Pearson, Discussant on questions of proof raised by the *Yorta Yorta* case, *The Past and Future of Land Rights Conference*, AIATSIS, Townsville 28-31 August 2001.

[4] *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (*Yorta Yorta* determination).

[5] referring to the 1881 Petition to the Governor of New South Wales signed by 42 residents of Maloga Mission who requested that lands be reserved for them so that they could 'support ourselves by our own industry'. The petition was

tendered by the applicants as evidence of the ongoing struggle for the return of lands. Instead, it was adjudged evidence of abandonment of laws and customs.
[6] [2002] FCA 1342 (1 November 2002), per O'Loughlin J at [681].
[7] *Yorta Yorta* High Court appeal, summary of claimants' arguments by Gleeson CJ, Gummow and Hayne JJ at [17-20].
[8] *Yorta Yorta* determination at [121-5].
[9] Ibid., [128].
[10] Ibid., [123].
[11] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2001] FCA 45 at [127] (*Yorta Yorta* Federal Court appeal).
[12] *Yarmirr v Northern Territory* D9/2000 (6 February 2001) High Court Transcript. See also *Yorta Yorta* Federal Court appeal, per Branson and Katz JJ at [140-1].
[13] Ibid., *Yarmirr v Northern Territory* D9/2000 (6 February 2001) High Court Transcript.
[14] *Yorta Yorta* High Court appeal at [46].
[15] Ibid., [112, 101].
[16] Ibid., [111].
[17] Ibid., [31].
[18] In *Mabo*, while the High Court recognised that Indigenous rights to land survived the acquisition of sovereignty, to be protected by the common law, acts of the state that were adverse to the rights of Indigenous peoples to their land were not wrongful. The law legitimated the exercise of political power against Indigenous people. *Mabo v Queensland [No.2]* (1992) 175 CLR 1 (*Mabo*) per Mason CJ and McHugh J, with the authority of the Court, p. 15.
[19] Ibid., [43-4].
[20] Ibid., [37].
[21] Ibid., [129].
[22] Ibid., [46].
[23] Ibid., [47].
[24] Ibid., [49].
[25] Ibid., [56].
[26] Ibid., [116].
[27] Ibid., [117].
[28] Ibid., [96].
[29] Ibid., [44].
[30] Ibid., [119].
[31] Ibid., [121].
[32] *State of Western Australia v Ward* [2002] HCA 28 (8 August 2002). See for example [78, 215, 234].
[33] *Mabo* per Deane and Gaudron JJ at 110; per Toohey J at 192.
[34] *Yanner v Eaton* [1999] HCA 53 (7 October 1999) (*Yanner*) per Gummow J at [68]. See also *Campbell v Arnold* (1982) 565 FLR 382 (NTSC), concerning the *Crown Lands Act 1978* (NT) regarding the use of firearms in hunting.
[35] *Yorta Yorta* Federal Court appeal per Branson and Katz JJ at [125].
[36] Ibid., [127].
[37] *Mabo* per Brennan J at 61 and 70, Deane and Gaudron JJ at 110. See also, Gummow J in *Yanner* at [68] who referred to 'evolved or altered form of traditional behaviour'.
[38] *Mabo*, per Brennan J at 61.
[39] Pearson (op cit.) would suggest what may seem a radical approach, that the requirements for proof should begin with the perceptions of the contemporary society – do they identify as a social and cultural group, defined by their status as Indigenous and their history as the original owners of the area claimed? On this test, Justice Olney's decision can only be interpreted as suggesting that the Yorta Yorta have fabricated their identity. A similar view was expressed by Justice Kirby during argument in *Members of the Yorta Yorta Aboriginal Community v Vic*, M128/2001 (24 May 2002) transcript, 'when Australia began to accept their entitlement to a separate identity, it flourished again, it came again. Now, the question is: was there abandonment in that history or was it simply the reality of those times that they had to face up to?'
[40] *Yorta Yorta* High Court appeal, at [87, 89]. Compare the dissenting judgment of Gaudron and Kirby JJ. They rejected the requirement that connection be 'substantially maintained', suggesting that this term finds no expression in the NTA.
[41] Ibid., [83].
[42] That is, native title can not be extinguished contrary to the NTA. Abandonment is not a basis for extinguishment contemplated by the NTA and cannot be introduced through reference to the definition of native title in s.223 which requires that native title be 'recognised by the common law': s.223(1)(c). *Ward* [16-18].
[43] *Yorta Yorta* High Court appeal, at [90].
[44] *De Rose v South Australia* [2002] FCA 1342 (1 November 2002). See for example [106].
[45] *Yorta Yorta* High Court appeal at [95-6].
[46] Ibid., [80].
[47] Ibid., [80, 77].

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